

ONE HUNDRED EIGHTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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May 31, 2023

The Honorable Lina M. Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Dear Chair Khan:

The Committee on the Judiciary is conducting oversight of the programs and operations of the Federal Trade Commission (FTC). On February 14, 2023, the Committee wrote to you requesting documents and information related to the FTC's proposed ban on voluntary non-compete clauses, including the manner in which the FTC developed the proposed rule, and how the FTC assessed its impact throughout the economy.<sup>1</sup> To date, the FTC's document production has included little more than non-substantive calendar invites and material already publicly available, along with a vague promise to "submit additional productions on a rolling basis as [the FTC] locate[s] responsive documents."<sup>2</sup> We have recently learned, however, that the FTC has deleted material likely responsive to the Committee's requests.

The Committee's requests seek, among other things, documents related to the litigation risks due to the rulemaking, economic analyses related to the rulemaking, and communications between the FTC and third parties about the rulemaking.<sup>3</sup> In its initial response, the FTC stated that 47 employees, contractors, advisors or consultants worked on or contributed to the rulemaking.<sup>4</sup> The FTC also identified eight individuals who are expected to play or have played a supervisory role related to the rulemaking.<sup>5</sup> One such individual was a Consumer Financial Protection Bureau (CFPB) employee detailed to the Commission, who "led the team on a daily

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<sup>1</sup> See Letter from Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. to Hon. Lina M. Khan, Chair, FTC, et al. (Feb. 14, 2023) (*hereinafter* "Committee Feb. 14 Letter"). See also Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482-83 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

<sup>2</sup> See Letter from Hon. April J. Tabor, Secretary, FTC to Jim Jordan, Chairman, H. Comm. on the Judiciary (Feb. 28, 2023) (*hereinafter* "FTC Feb. 28 Letter")

<sup>3</sup> See Committee Feb. 14 Letter at 3-4.

<sup>4</sup> See FTC Feb. 28 Letter at 2.

<sup>5</sup> *Id.*

basis,” “supervised the drafting of the [proposed rule],” ensured that drafts were circulated among Commission senior leadership, and “oversaw any legal research.”<sup>6</sup>

Only recently, on May 16, 2023—over three months after our first request—did FTC staff explain to the Committee that the FTC has already deleted materials that are likely responsive to the Committee’s request.<sup>7</sup> Although FTC staff represented that these deletions occurred prior to the Committee’s February 14 letter, the FTC’s failure to maintain these records materially impedes the Committee’s oversight. Based on conversation with FTC staff, the Committee understands that the deleted materials included some of the files of the CFPB employee who you brought on to lead the FTC’s rulemaking, as well as some of the materials of several additional employees. The FTC’s approach to record retention is concerning, and the FTC may have violated federal record-keeping law by deleting these materials.<sup>8</sup>

To assist the Committee in its continued oversight of the FTC’s proposed ban on voluntary non-compete clauses, and to better understand the FTC’s practices with respect to records management, we request that you provide the following information:

1. All documents and communications referring or relating to the FTC’s record retention policy;
2. A full and complete explanation as to why any records responsive to the Committee’s February 14, 2023, letter have been deleted, including the identities of FTC employees responsible for the agency’s records management practices;
3. A list of any records or communications that have been deleted that would have been responsive to the Committee’s February 14, 2023, letter, including the FTC custodian(s) of these records; and
4. A description of the steps taken to recover any deleted responsive material, copies of which may be archived in different accounts or agency backup files.

Please produce all documents and information as soon as possible but no later than 5:00 p.m. on June 14, 2023.

The Committee on the Judiciary is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of and legislate on matters relating to the “[p]rotection of trade and commerce against unlawful restraints and monopolies.”<sup>9</sup> If you have any questions about this matter, please ask your staff to contact Committee staff at (202) 225-6906.

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<sup>6</sup> *Id.*

<sup>7</sup> Meeting between House Judiciary Committee and FTC Staff (May 16, 2023).

<sup>8</sup> *See, e.g.*, 44 U.S.C. § 31, *et seq.*; *see also* 5 U.S.C. § 552, *et. seq.*

<sup>9</sup> Rules of the U.S. House of Representatives, R. X (2023).

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Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Jim Jordan". The signature is stylized with a large, looping "J" and a cursive "Jordan".

Jim Jordan  
Chairman

cc: The Honorable Jerrold L. Nadler, Ranking Member